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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1625

STEPHEN L. GREGORY, ET AL., PETITIONERS

v.

CURTIS W. TARR, NATIONAL DIRECTOR OF SELECTIVE SERVICE, ET AL.

No. 1556

THOMAS E. WHITMORE, PETITIONER

v.

CURTIS W. TARR, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Gregory* (G. Pet. App. 36–43) is reported at 436 F. 2d 513. The opinion of the district court (G. Pet. App. 28–35) is reported at 311 F. Supp. 1.

The order of the court of appeals in *Whitmore* (W. Pet. App. C) is not yet reported. The opinion of the district court (W. Pet. App. B) is reported at 318 F. Supp. 1279.

JURISDICTION

The judgment of the court of appeals in *Gregory* was entered on January 26, 1971, and the petition for a writ of certiorari was filed on April 24, 1971. The judgment of the court of appeals in *Whitmore* was entered on February 24, 1971, and the petition for a writ of certiorari was filed on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3), bars pre-induction judicial review of petitioners' claims that they are entitled to fatherhood deferments.

STATUTES AND REGULATION INVOLVED

Section 6(h) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 456(h), provides in pertinent part:

> (1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the

date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. * * *

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons * * * whose activity in graduate study, * * * or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest * * *. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *

32 C.F.R. 1622.30(a) (January 1, 1970) provided:

> (a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * * except that a registrant who is classified in Class II–S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph.

STATEMENT

These civil suits were instituted by Selective Service registrants seeking pre-induction judicial review of the refusal by their local boards to grant them III–A fatherhood deferments pursuant to Section 6 (h)(2) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 456(h)(2)) and 32 C.F.R. 1622.30(a) (January 1, 1970).[1] Petitioners, who had received II–S student deferments as graduate students (but not as undergraduates) under the 1967 Act, were denied fatherhood deferments pursuant to the proviso in 32 C.F.R. 1622.30(a), making ineligible for a III–A deferment any "registrant who is classified in Class II–S after the date of enactment" of the 1967 Act on June 30, 1967. They seek to enjoin their induction and to compel their local boards to place them in Class III–A.

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[1] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, has terminated the availability of the III–A fatherhood deferment, and 32 C.F.R. 1622.30(a), as cited above, was revoked by that order. However, this change does not apply to persons, such as petitioners, who claim eligibility accruing prior to that date. All references herein to 32 C.F.R. 1622.30(a) are to the regulation as it stood prior to that change.

1. The *Gregory* suit was commenced as a class action in the United States District Court for the Eastern District of Michigan on behalf of all registrants claiming a fatherhood deferment prior to April 23, 1970, who had previously received a II–S graduate student deferment subsequent to June 30, 1967, but not a II–S undergraduate student deferment after that date. It was argued that these registrants were entitled to a III–A fatherhood classification as a matter of law, and thus that the local boards' denials of such claims warranted pre-induction review within the narrow judicial exception to Section 10(b)(3).

The district court (G. Pet. App. 28–35) found that the question presented could properly be entertained by the courts in a civil action instituted prior to induction and decided the merits in favor of petitioners, both individually and as a class.[2] It concluded that Section 6(h)(1) and (2) required that registrants within the designated class be granted fatherhood deferments, and thus 32 C.F.R. 1622.30(a) could not properly be interpreted to deny the III–A classification to those whose only II–S deferment after June 30, 1967 was for graduate, as distinguished from undergraduate, studies (G. Pet. App. 28–33).

On January 26, 1971, the court of appeals reversed (G. Pet. App. 36–43), holding that the issue raised was

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[2] Respondents did not question the validity of the class action despite the fact that no notice to the members of the class was given as provided by Rule 23, Fed. R. Civ. P. But see G. Pet. App. 38 n. 2.

not a proper question for pre-induction judicial review. It ruled that Congress had delegated to the President authority to grant both graduate student and fatherhood deferments, under such conditions and with such limitations as he, in his discretion, deemed advisable (G. Pet. App. 42–43). Since the promulgation of 32 C.F.R. 1622.30(a) was considered by the court to be a proper exercise of that authority, and the regulation by its terms excluded those receiving any II–S classification under the 1967 Act from eligibility for fatherhood deferment, the court below held that there was no occasion to review the administrative denials of III–A classifications to this class of registrants prior to the dates set for their inductions. An application for a stay of the mandate was denied by the court of appeals, and a further application for a stay was denied by this Court on March 29, 1971.

2. The *Whitmore* suit was instituted in the United States District Court for the District of Nebraska following the district court's decision in *Gregory*. Whitmore claimed that he was a member of the class entitled to protection under the *Gregory* decree. The *Whitmore* district court, although disagreeing with the jurisdictional holding of the district court in *Gregory* (W. Pet. App. B 1281–1283), concluded that *Gregory* was a valid class action and that Whitmore was a member of the class; it thus considered itself bound by the *Gregory* judgment (W. Pet. App. B 1285–1286).

On appeal to the Eighth Circuit, the court of appeals, following the Sixth Circuit's reversal in *Greg-*

ory, entered an order vacating the judgment of the district court and remanding the cause "for further consideration in light of *Gregory* v. *Tarr,* [436 F. 2d 513] * * *" (W. Pet. App. C). It is this ruling which Whitmore seeks to have this Court review.

ARGUMENT

Petitioners assert here, as they did below, that the denial of fatherhood deferments to those who have held II–S graduate student deferments after June 30, 1967, is a clear error of law by the local boards, and thus that their civil suits are within that limited category of Selective Service cases deserving pre-induction judicial review under the decisions by this Court in *Oestereich* v. *Selective Service Board,* 393 U.S. 233, and *Breen* v. *Selective Service Board,* 396 U.S. 460. We cannot agree. In those cases, this Court carved out an exceedingly narrow exception to the statutory proscription on judicial review of the administrative classification and processing of Selective Service registrants prior to the time that they had "responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3); compare *Clark* v. *Gabriel,* 393 U.S. 256. The predicate for entertaining pre-induction jurisdiction in both cases was a judicial determination that the action in question involved "a clear departure by the [local] Board from its statutory mandate." *Breen* v. *Selective Service Board,* 396 U.S. 460, 467; see also *Gutknecht* v. *United States,* 396 U.S. 295.

Here, however, unlike *Oestereich, Breen,* and *Gutknecht,* we are not concerned with any such departure.

The fatherhood deferment claimed in these cases is a matter which Congress has left almost entirely within the discretion of the President, to grant or to terminate (see n. 1, supra) as he sees fit with respect to "any or all categories" of fathers, "under such rules and regulations as he may prescribe." 50 U.S.C. App. (Supp. V.) 456(h)(2). The only statutory limitation on the President's exercise of discretion in this area is contained in Section 6(h)(1), 50 U.S.C. App. (Supp. V) 456(h)(1), which specifically prohibits the assignment of III–A fatherhood deferments to registrants who have previously received II–S *undergraduate* student deferments since June 30, 1967.

A. Petitioners contend (G. Pet. 16–18) that, because Congress confined the restriction in Section 6(h)(1) to undergraduate students, the President was without authority to promulgate a regulation (32 C.F.R. 1622.30(a)) also depriving graduate students of fatherhood deferments. But, nothing in the 1967 Act, either explicitly or by implication, guarantees graduate students a right to III–A classification if they subsequently become fathers. If the President has authority to terminate the fatherhood deferment altogether, which is not disputed (G. Pet. 9 n. 1), he plainly is authorized by the statute to terminate it with respect to "any * * * categories of persons who have children * * *" (50 U.S.C. App. (Supp. V) 456 (h)(2).[3] Nor to our knowledge has any appellate

[3] The instant cases are thus unlike the "I–S" cases on which petitioners place heavy reliance (G. Pet 13). Section 6(i)(2), 50 U.S.C. App. (Supp. V) 456(i)(2) *mandates* that a student who has been ordered to report for induction "shall" be deferred—

court held otherwise. Indeed, the sole support for petitioners' contention is found in the concurring opinion of three judges in *Hunt* v. *Local Board,* No. 18,076, decided February 5, 1971, an *en banc* decision in the Third Circuit (G. Pet. 21–23). Not only did the views expressed there fail to command a majority, but, more to the point, they relied exclusively on the district court's decision in *Gregory,* which has now been reversed by the Eighth Circuit.

B. Petitioners maintain, however, that, even if the President is authorized by statute so to circumscribe the fatherhood deferment, he has not done so in explicit terms; thus, they argue (G. Pet. 11–12), for the local boards to construe 32 C.F.R. 1622.30(a) as precluding graduate students from obtaining a III–A classification is "blatantly lawless" action, as that term was used in *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 237. This contention is without merit.

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under a I–S classification (32 C.F.R. 1622.15(b))—until the end of the current academic year. Thus, the courts have construed both the statute and the regulation as entitling both undergraduate and graduate students to the mandatory I–S deferment if they are called up before the end of the academic year. See, *e.g.*, *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), affirmed, 412 F. 2d 71 (C.A. 2); *Nestor* v. *Hershey*, 425 F. 2d 504 (C.A. D.C.); *Bowen* v. *Hershey*, 410 F. 2d 962 (C.A. 1) (on stay pending appeal), on merits *sub nom. Crane* v. *Hershey*, 410 F. 2d 966 (C.A. 1); *Foley* v. *Hershey*, 409 F. 2d 827 (C.A. 7). And that construction has been followed by Selective Service. See Local Board Memorandum No. 87, as amended, September 24, 1970. But, as shown above, there is no similar statutory mandate with respect to the fatherhood deferments entrusted by Section 6(h)(2) to the discretion of the President.

The questioned regulation provides in pertinent part (32 C.F.R. 1622.30(a)):

> (a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * * except that a registrant who is classified in Class II–S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph.

This language has consistently been construed by the government as precluding both undergraduate and graduate students from obtaining fatherhood deferments, primarily to discourage the practice of "pyramiding" deferments in order to obtain total exemption from military service. See, *e.g., Wright* v. *Local Board,* 319 F. Supp. 509 (D. Minn.), appeal pending, C.A. 8, No. 71-1011; *Unted States ex rel. Plotner* v. *Resor,* 3 S.S.L.R. 3342 (S.D. Ga.), appeal pending, C.A. 5, No. 31030; *Germonprez* v. *Director of Selective Service,* 318 F. Supp. 829 (D.D.C.); *Pasquier* v. *Tarr,* (W.D. La.), appeal pending, C.A 5, No 30,934 Such a construction is plainly warranted by the terms of the regulation (cf. *Ehlert* v. *United States,* No. 120, this Term, decided April 21, 1971, slip op. 6–7), and thus the administrative denials of fatherhood deferments in the instant cases cannot reasonably be labeled "blatantly lawless" action by the local boards, even assuming *arguendo* that the regulatory language might also lend itself to the construction urged by petitioners. Otherwise, every challenge to an interpretation by the Se-

lective Service System of its own regulations would come within the *Oestereich* and *Breen* exception. Cf. *Swift* v. *Director of Selective Service,* C.A.D.C., No. 24,137, decided March 16, 1971, petition for rehearing pending, erroneously characterizing the local board's interpretation of 32 C.F.R. 1625.2—in the manner later upheld by this Court in *Ehlert*—as "blatantly lawless" action entitled to pre-induction judicial review.

C. Accordingly, the courts below properly declined to entertain jurisdiction of these civil suits, instituted prior to the time when the registrants had "responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3). We agree with petitioners (G. Pet. 26) that the issue now before the Court in *Fein* v. *Selective Service System Local Board No. 7,* certiorari granted, March 8, 1971, No. 1129, this Term, is not in these cases; there, the challenge is to appellate administrative procedures solely on constitutional grounds, whereas, here the challenge is to the substantive regulation—plainly authorized by the statute—that mandates the denial of the deferments sought by petitioners. There is thus no need to hold these cases pending disposition of *Fein.*

Moreover, since there is no longer a III–A deferment for fatherhood status (supra n. 1) or a general II–S deferment for graduate students,[4] the regu-

[4] The 1967 Act specifically precludes the granting of a II–S graduate student deferment to registrants who have received an undergraduate student deferment after June 30, 1967 (50 U.S.C. App. (Supp. V) 456(h)(1)), unless the graduate student is "pursuing a course of graduate study in medicine, den-

latory interpretation question presented in these petitions is of no continuing importance and does not warrant further consideration by this Court.

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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MAY 1971.

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tistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of national health, safety, or interest as are identified by the Director of Selective Service upon the advice of the National Security Council." 32 C.F.R. 1622.26; 50 U.S.C. App. (Supp. V) 456(h)(2). The Director has not yet identified any "other subjects" as necessary to the maintenance of the national health, safety or interest.

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